Supreme Court, U.S.
FILED
JUL 18 1997
CLERK

No. 96-1994

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

GARLAND DENTY,
Petitioner,

v.

SMITHKLINE BEECHAM CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

STEVEN B. FEIRSON
Counsel of Record
DAVID M. HOWARD
PAUL D. SNITZER
DECHERT PRICE & RHOADS
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103
(215) 994-4000
Counsel for Respondent

July 18, 1997

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

26 pp

QUESTION PRESENTED FOR REVIEW

Whether the Age Discrimination in Employment Act and the Pennsylvania Human Relations Act may be extended extraterritorially to apply to the filing by a United Kingdom corporation, not controlled by an American corporation, of job openings in the United Kingdom and Australia.

RULE 29.6 LISTING

SmithKline Beecham Corporation ("SBC"), the respondent herein, is wholly owned by SmithKline Beecham plc ("SB plc"), a corporation organized under the laws of the United Kingdom of Great Britain.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
RULE 29.6 LISTING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATUTES INVOLVED IN THE CASE	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	6
REASONS FOR DENYING THE WRIT	7
I. THE DECISION BELOW DOES NOT CONFLICT WITH ANY OTHER CIRCUIT COURT DECISION	7
II. THIS ISSUE IS UNLIKELY TO ARISE FREQUENTLY, AND SO THE PETITION DOES NOT PRESENT AN IMPORTANT QUESTION FOR THIS COURT TO RESOLVE	8
III. THE PETITION RAISES ONLY A QUESTION OF APPLICATION OF LAW TO FACT	9
IV. THIS COURT WOULD BE REQUIRED TO MAKE COMPLICATED FACTUAL FINDINGS IF IT GRANTED THE PETITION FOR CERTIORARI	10
V. THE PETITION IS BASED ON ARGUMENTS NOT RAISED BELOW	11
VI. THE APPLICATION OF SECTION 623(H)(2) IS IN ACCORD WITH PRECEDENT FROM THIS COURT AND WAS OBVIOUSLY CORRECT	12

TABLE OF CONTENTS—Continued

Page

A. Congress in 1984 Exempted Foreign Corporations Not Controlled by an American Corporation From all Extraterritorial Applications of the ADEA 12

B. The Workplace Test was Created To Further the Principle Against the Extraterritorial Application of Federal Law; Petitioner's Rule Would Do Just the Opposite 13

C. The ADEA Does Not Provide for Different Extraterritorial Rules in Cases of "Promotion" Than in Cases of "New Hire." 16

CONCLUSION 19

TABLE OF AUTHORITIES

CASES — Page

Cleary v. United States Lines, 728 F.2d 607 (3d Cir. 1984) 12, 15
Davis v. United States, 110 S. Ct. 2014 (1990) 11
Denty v. SmithKline Beecham Corporation, 109 F.3d 147 (3d Cir. 1997) 1, 5
Denty v. SmithKline Beecham Corporation, 907 F. Supp. 879 (E.D. Pa. 1995) 1, 3, 4
EEOC v. Arabian American Oil, 499 U.S. 244 (1991) 11, 12, 13
Hishon v. King & Spalding, 467 U.S. 69 (1984) 15, 16, 18
Lopez v. Pan Am World Services, Inc., 813 F.2d 1118 (11th Cir. 1987) 15, 16
NLRB v. Hendricks County Rural Electric Corp., 454 U.S. 170 (1981) 10
Pfeiffer v. Wm. Wrigley Jr. Co., 755 F.2d 554 (7th Cir. 1985) 14, 15
Ralis v. RFE/RL, Inc., 770 F.2d 1121 (D.C. Cir. 1985) 15
Rice v. Sioux City Cemetery, 849 U.S. 70 (1955) 9
S.F. DeYoreo v. Bell Helicopter Textron, Inc., 785 F.2d 1282 (5th Cir. 1985) 15
Thomas v. Brown & Root, Inc., 754 F.2d 279 (4th Cir. 1984) 12, 15
Vermilya-Brown Co., Inc. v. Connel, 335 U.S. 377 (1948) 14
Zahourek v. Arthur Young & Co., 750 F.2d 827 (10th Cir. 1984) 12, 15, 16, 17

STATUTORY PROVISIONS

29 U.S.C. § 213(f) 14
29 U.S.C. § 621 1
29 U.S.C. § 623(a) 17
29 U.S.C. § 623(h) 2, 4, 7, 8, 12, 13
42 U.S.C. § 2000e 9
Pub. L. No. 85-231, § 1(1), 71 Stat. 514 (1957) 14

MISCELLANEOUS

Supreme Court Rule 10.1 ..... 8, 9

TABLE OF AUTHORITIES—Continued

Page

17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure*, § 4036, at 38-39 (2d ed. 1988 & Supp. 1991) 12

S. Rep. No. 987, 85th Cong., 1st Sess., *reprinted in* 1957 U.S.C.C.A.N. *Fair Labor Standards Act—Overseas Area*, 1756, 1757 14

S. Rep. No. 98-467, 98th Cong., 2d Sess. 27-28 (1984) *reprinted in* 1984 U.S.C.C.A.N. *Older Americans Act Amendments of 1984*, 2974, 2975 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-1994

GARLAND DENTY,

Petitioner,

v.

SMITHKLINE BEECHAM CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The unanimous March 17, 1997 opinion of the United States Court of Appeals for the Third Circuit affirming the District Court's grant of summary judgment in favor of SmithKline Beecham Corporation, is reported as *Denty v. SmithKline Beecham Corporation,* 109 F.3d 147 (3d Cir. 1997). The opinion of the District Court for the Eastern District of Pennsylvania, the Honorable Louis H. Pollak, granting summary judgment in favor of SmithKline Beecham Corporation, is reported as *Denty v. SmithKline Beecham Corporation,* 907 F. Supp. 879 (E.D. Pa. 1995). Both opinions are included in the Appendix to the Petition for Writ of Certiorari.

STATUTES INVOLVED IN THE CASE

In concluding that the Age Discrimination in Employment Act (the "ADEA"), 29 U.S.C. § 621 *et seq.*, did not

apply to regulate an independent foreign company acting outside of the United States to fill its own jobs also located outside of the United States, the Circuit and District courts relied upon the ADEA's statutory exemption, 29 U.S.C. § 623(h)(2), for foreign corporations not controlled by American employers. The exemption reads as follows:

> **Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control**
>
> (1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.
>
> **(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.**
>
> (3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the
>
> (a) interrelation of operations,
>
> (b) common management,
>
> (c) centralized control of labor relations, and
>
> (d) common ownership or financial control,
>
> of the employer and the corporation.

29 U.S.C. § 623(h) (emphasis added).

STATEMENT OF THE CASE

The full facts, as well as the statutory scheme, governing this case are set forth in the opinion of the Third Circuit and the District Court. Pet. App. 1-20. What follows is a summary of those matters.

1. *Facts.* On April 11, 1989, SmithKline Beckman Corporation, a Pennsylvania corporation, and Beecham

Group plc, a company incorporated under the laws of the United Kingdom, merged. The entity resulting from this merger was SB plc, a corporation also organized under the laws of the United Kingdom. The corporate headquarters of SB plc was in Brentford, England and its shares were publicly traded on the London stock exchange. SB plc became the 100% owner of the common stock of SBC, its United States subsidiary.

At all relevant times, petitioner worked in Philadelphia for SBC, SB plc's U.S. subsidiary. At no time was petitioner ever employed by SB plc. There is no dispute that SBC was controlled by SB plc, i.e., the foreign parent controlled the American subsidiary.

Petitioner claims that he should have received four jobs with his employer's foreign parent, SB plc, during July 1992. Three of the four positions which petitioner claimed should have been his were located in the United Kingdom. The fourth position was located in Australia. It is undisputed that an SB plc executive made the selection decisions during a selection process conducted in the United Kingdom and that all the positions in question were with the foreign parent, SB plc.

2. *Opinions Below.*

Based on these facts, the District Court, The Honorable Louis H. Pollak, granted summary judgment to SBC. The District Court found that in 1984, Congress, in response to a series of unanimous holdings from seven circuit courts that the ADEA did not apply at all abroad, amended the Act to give it, for the first time, a "limited extraterritorial reach" in order to allow it to reach conduct abroad by American corporations and American controlled corporations. Pet. App. at 13. Congress at the same time added a new subsection of 29 U.S.C. § 623—"the primary operative provision of the ADEA, which lists prohibited employer practices." Pet. App. at 14. This new subsection exempted from the prohibitions of the

ADEA all "foreign person[s] not controlled by an American employer." 29 U.S.C. § 623(h)(2).

Applying this statutory language of the ADEA, the District Court first addressed petitioner's argument that his claim that he should have been sent abroad to work for the foreign parent company did not involve an extraterritorial application of the ADEA and did not invoke the foreign corporation exemption set forth in § 623 (h)(2). The District Court rejected this claim stating that petitioner's argument that he was not seeking an extraterritorial application of law "ignores the crucial facts that the positions Dentry allegedly was denied on the basis of age were outside the United States, for an English employer." Pet. App. at 20.[1]

The District Court also found that while petitioner "argue[d] that SB plc and SBC are indistinguishable and should be considered a 'single employer,'" the "'single employer' inquiry advocated by Denty is not the correct inquiry in this case." Pet. App. at 18. Under the ADEA's 1984 amendments the "issue is not whether SB plc and SBC should be considered a single employer but whether Denty sought employment with an employer 'controlled' by an American firm." Pet. App. at 18. And on this determinative issue of "control," the District Court found that all of the "evidence garnered by Denty leads to the unsurprising conclusion that the American subsidiary is controlled by its English parent." Pet. App. at 19. This conclusion has never been challenged by petitioner. Ac-

---

[1] The District Court also rejected petitioner's assertion that in cases arising from denial of job applications to jobs for foreign companies in foreign lands, courts should apply two different rules of extraterritorial application depending on whether the denial of the job application is characterized as a "failure to promote" or a "failure to hire." The District Court rejected this supposed distinction because "nothing in the text of the ADEA . . . supports a distinction between applications for a promotion and applications for a new job." Pet. App. at 17.

cordingly, the District Court concluded that petitioner "can only claim that he applied for positions outside the United States for an English corporation," and thus "[t]he ADEA has no application in this situation." Pet. App. at 19.

The United States Court of Appeals for the Third Circuit unanimously affirmed the grant of summary judgment for SBC. The Third Circuit agreed with the District Court's finding that Congress when it enacted the foreign corporation exemption in § 623(h)(2), "the key provision in this case," provided for a "limited extraterritorial application" of the ADEA to *American* owned or controlled companies abroad. Pet. App. at 6. The Third Circuit's "reading of the plain language of the statute compel[led] [it] to agree," with the District Court's conclusion that the ADEA did not apply extraterritorially unless the foreign employer is controlled by an American employer. Pet. App. at 7. And, because "SB plc controls the American subsidiary, not the other way around . . . the ADEA cannot be applied extraterritorially to create liability on the part of SB plc given the facts of this case."[2] Pet. App. at 8.

The Third Circuit concluded that the Congress' policy decision to exempt all independent foreign corporations from the extraterritorial reach of the ADEA could not have been "more clear." Pet. App. at 9. Because "the ADEA does not apply where a foreign corporation controls an American corporation and the employment is with the foreign person abroad," the Third Circuit "affirm[ed] the judgment of the District Court." Pet. App. at 9.

---

[2] The Third Circuit also rejected petitioner's claim that the ADEA distinguished in its extraterritorial application between "new hire" and "promotion" claims—"the language of the ADEA does not distinguish between failure to hire and failure to promote situations." Pet. App. at 7 n.5.

SUMMARY OF ARGUMENT

Certiorari should be denied for all the following reasons:

1. *The Decision Below Does Not Conflict With Any Other Circuit Court Decision on the Question Presented.* The petitioner admits that the decision below is one of first impression. *See* Petition for Certiorari at 10 ("Neither this Court nor any other Court of Appeals has addressed" the "question" presented by petitioner). And, in fact, it is true that no other federal or state court has considered the issue framed by petitioner. *Infra* at p. 7.

2. *The Question Presented Is Relatively Unimportant and Unlikely To Recur Frequently.* The issue of whether the ADEA applies overseas to a foreign company not controlled by an American employer when that company fills overseas jobs is not likely to arise frequently. The absence, from the enactment of the ADEA in 1967 to the present day, of any other case addressing the question presented here, establishes that the petitioner's claim is novel and that there is not now, nor is there likely to be in the future, a ground swell of claims being made against foreign parent companies because of how they filled their own overseas job openings. *Infra* at p. 8.

3. *The Question Presented Merely Raises An Issue of Statutory Application, Not Interpretation.* Certiorari should also be denied because the Petition's *sole* argument is that the ADEA's express exemption for foreign employers should not apply under the particular facts of this case. This is *not* an argument of statutory interpretation. It is, at best for petitioner, only an argument about whether a properly stated rule of law should apply to the unique set of facts presented here. *Infra* at p. 9.

4. *The Application Urged by Petitioner Poses Complex and Unique Factual Issues.* The Petition is premised on the assumption that it would be appropriate on the record of this case to disregard the corporate forms of

a foreign parent company and its United States subsidiary, and that the ADEA should, as a result, be applied extraterritorially to the foreign parent. Putting to one side the point that even if that factual assumption were true the petitioner still would not prevail, the courts below did not make any factual findings about piercing the corporate veil of any company, and this Court does not sit to sift through these types of complicated factual issues. *Infra* at p. 10.

5. *Petitioner's Argument Here Was Never Raised Below.* The petitioner neither alleged in his Complaint nor argued to the Court of Appeals that there should be a piercing of corporate veils in this case. Because the Petition is based on an argument neither raised nor decided below, it should be rejected. *Infra* at p. 11.

6. *The Application of the Statutory Exemption by the Courts Below Was Correct.* Finally, the petitioner's argument that the statutory exemption for foreign employers is "not relevant" (Petition at 3) to this case was correctly rejected by the courts below. The ADEA's statutory exemption for foreign employers was enacted by Congress in 1984 when Congress amended the ADEA to give it a limited extraterritorial reach. At that time, Congress exempted from all extraterritorial applications of the ADEA foreign firms, like SB plc, that "were not controlled by an American employer." 29 U.S.C. § 623(h)(2). Because petitioner sought to apply the ADEA to a foreign parent company for its foreign decisions about foreign workplaces, the statutory exemption for foreign employers applied and barred petitioner's claims. *Infra* at p. 12.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH ANY OTHER CIRCUIT COURT DECISION.

Certiorari should be denied because the decision below does not conflict with any holding from any other court. No other federal or state court in this country has con-

sidered whether, where the ADEA expressly exempts independent foreign companies from any and all extraterritorial applications of the Act, a claim may nevertheless be brought against a foreign company for its decisions abroad about filling its own jobs overseas. Petitioner admits as much. *See* Petition for Certiorari at 10 ("Neither this Court nor any other Court of Appeals has addressed" the "question" presented by the petitioner). Because the decision of the Third Circuit is one of first impression, the Petition for a Writ of Certiorari should be denied. *See* Sup. Ct. R. 10.1(a) (important consideration for certiorari is whether the court below has "rendered a decision in conflict with the decision" of another court of appeals or the highest court of a state on the same matter).

II. THIS ISSUE IS UNLIKELY TO ARISE FREQUENTLY, AND SO THE PETITION DOES NOT PRESENT AN IMPORTANT QUESTION FOR THIS COURT TO RESOLVE.

Petitioner cannot name one *litigant* who has ever argued that the ADEA has the reach he claims, much less one court. The reason for this lack of authority, presumably, is that other potential plaintiffs, if any, have recognized the obvious fallacy of the notion that the ADEA may be used to punish a foreign company, not controlled by an American employer, acting outside of the United States to fill foreign jobs. *See* 29 U.S.C. § 623(h)(2) ("The prohibitions of this subsection *shall not apply* where the employer is a foreign person not controlled by an American employer") (emphasis added).

There is just no reason to believe that numerous Americans, employed by American subsidiaries, are rushing to sue foreign parent companies because the foreign companies did not select them for jobs on foreign shores. To the contrary, the complete absence of any other case addressing this issue in the thirteen years after the enact-

ment of the 1984 amendments giving the ADEA limited extraterritorial reach, establishes that claims like petitioner's, which so clearly fly in the face of the statutory language, will be rare indeed. Since the claim made here has not and will not arise with any frequency, certiorari should be denied. *See Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955) (issue must be "beyond the academic or the episodic" to warrant a grant of certiorari).[3]

III. THE PETITION RAISES ONLY A QUESTION OF APPLICATION OF LAW TO FACT.

Certiorari should also be denied because the Petition does not raise any important questions of statutory interpretation. The Petition's *sole* argument is that the exemption for independent foreign companies enacted by Congress in 1984 is "not relevant" in the particular factual matrix presented by this case. Petition at 3. Thus, the petitioner has never urged any interpretation of the statutory exemption other than the one which is obvious from the face of the satute. Consistent with this view, the lower courts merely found that the foreign corporation exemption *applied* to this case. Accordingly, this case, at best for petitioner, merely raises a question of application of law to a particular set of facts—it does not raise a pressing question of statutory interpretation needing clarification by this Court. *See* Sup. Ct. R. 10.1 (Petition is "rarely granted" when the "asserted error" is the "misapplication of a properly stated rule of law").

---

[3] Petitioner asserts that the Third Circuit's decision will also have implications for claims arising under Title VII of the 1964 Civil Rights Act. 42 U.S.C. § 2000e *et seq.* But petitioner cites to no decisions in the thirty-three year history of that Act where a court considered whether Title VII applied to a foreign company deciding in a foreign country how to fill foreign job openings.

IV. THIS COURT WOULD BE REQUIRED TO MAKE COMPLICATED FACTUAL FINDINGS IF IT GRANTED THE PETITION FOR CERTIORARI.

The Petition for Certiorari ignores the "control" test that Congress mandated be used, and that the courts below applied, to determine whether the ADEA applied abroad to a foreign company. Instead, the Petition claims that a different, non-statutory, "piercing the corporate veil" test should be utilized to disregard the corporate forms of SB plc and SBC. Utilizing this "piercing" assumption, petitioner argues that because there are alleged interrelation of operations between SBC, his employer, and SB plc, the foreign parent company that made the selection decisions at issue, the corporate forms of these companies could be disregarded and the foreign SB plc deemed his employer. Only by making this assumption can petitioner posit that his claim is one arising out of the denial of a "promotion" rather than the denial of his application for "new hire." This distinction is critical to petitioner because even he is forced to admit that if his job application to SB plc is considered to be a "new hire" job application, he loses. *See* Petition at 15-16.

Thus, not only does petitioner's argument disregard the "control" test that Congress in 1984 explicitly directed be utilized to determine whether the ADEA applies to a foreign company overseas, it also raises the difficult factual question, not addressed below, of whether it is appropriate under this record to "pierce" the corporate form of a foreign parent company and its United States subsidiary. Because this Court does not sit to resolve these types of factual disputes, certiorari should be denied. *See e.g., NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981) (improvident grant of cross-petition that presented primarily a question of fact that did "not merit Court review").

V. THE PETITION IS BASED ON ARGUMENTS NOT RAISED BELOW.

Petitioner did not allege in his Complaint nor assert in the Third Circuit that the corporate forms of SB plc and SBC should be pierced so that he could be deemed to be an employee of SB plc. The courts below did not, therefore, examine the facts in the record to determine whether it would be appropriate to disregard the corporate form of any company. There is simply no reason why review should be granted to a case where the Court will be required to comb through the factual record to attempt to resolve factual issues that were not raised below.

The courts below also did not address the legal issues raised by the Petition's assumption that the corporate veil of a foreign parent company, not incorporated in the United States, should be disregarded by a United States court. These issues include (1) whether United States or United Kingdom law would apply to determine whether the corporate form of a U.K. firm could be disregarded and (2) under whichever law applied, would it be permissible under the ADEA and principles or international comity to disregard the corporate form of an independent foreign company because it allegedly has some overlapping operations with its U.S. subsidiary. *See e.g., EEOC v. Arabian American Oil,* 499 U.S. 244, 255 (1991) (applying United States employment law to "foreign corporations operating in foreign commerce" raises "difficult issues of international law" because it imposes "this country's employment-discrimination regime upon foreign corporations"). None of these critical and difficult issues were raised or decided below. In fact, they are not even addressed in the Petition.

Hence, certiorari should also be denied because the Petition is based on assumptions, both factual and legal, which were neither raised nor addressed below. *See e.g., Davis v. United States,* 110 S. Ct. 2014, 2024 (1990) (Court would "decline to address" argument "neither raised before nor decided by the Court of Appeals"); *see*

also 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure*, § 4036, at 38-39 (2d ed. 1988 & Supp. 1991) (Court reluctant to consider an issue not addressed by the court of appeals, even if properly raised, because it would lose "the advantage of prior appellate scrutiny of the record and deliberation of the arguments").

VI. THE APPLICATION OF SECTION 623(H)(2) IS IN ACCORD WITH PRECEDENT FROM THIS COURT AND WAS OBVIOUSLY CORRECT.

A. Congress in 1984 Exempted Foreign Corporations Not Controlled by an American Corporation From all Extraterritorial Applications of the ADEA.

Prior to 1984 all of the circuit courts that had considered the question held that the ADEA did not reach beyond the territory of the United States.[4] These courts relied upon the "longstanding principle of American law" that " 'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' " *EEOC v. Arabian American Oil Co.*, 499 U.S. at 248 (quoting *Foley Brothers, Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). The presumption "reflects the principle of international comity, under which the United States should avoid interference with the laws of another sovereign over conduct occurring within its territory." Pet. App. at 13.

In 1984 Congress responded by amending the ADEA "to give it a limited extraterritorial reach." Pet. App. at 13. Congress amended the ADEA by adding a new subsection, 29 U.S.C. § 623(h), the first clause of which provides that where a United States employer "*controls* a corporation whose place of incorporation is in a foreign country, any practice by such corporation shall be presumed to be such practice by" the U.S. employer. 29 U.S.C. § 623(h)(1) (emphasis added). But, if the for-

---

[4] *See e.g., Cleary v. United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984); *Zahourek v. Arthur Young & Co.*, 750 F.2d 827 (10th Cir. 1984), *Thomas v. Brown & Root, Inc.*, 754 F.2d 279 (4th Cir. 1984).

eign corporation is "*not controlled* by an American employer," then the "prohibitions of this section shall not apply." 29 U.S.C. § 623(h)(2) (emphasis added).

The effect of these amendments was to exempt foreign corporations from any extraterritorial application of the ADEA unless they are "controlled" by an American parent.[5] *See e.g., Arabian American Oil*, 499 U.S. at 259 (ADEA's 1984 amendments provide that it will apply overseas only " 'to citizens of the United States employed in foreign countries by U.S. corporations or their subsidiaries' ") (quoting S. Rep. No. 98-467, 98th Cong., 2d Sess. 27-28 (1984) *reprinted in* 1984 U.S.C.C.A.N. *Older Americans Act Amendments of 1984*, 2974, 2975)). Hence, the courts below properly applied the § 623(h)(2) exemption to SB plc, a foreign parent company "not controlled by an American employer," for its overseas decisions about its own foreign jobs.

B. The Workplace Test Was Created To Further the Principle Against the Extraterritorial Application of Federal Law; Petitioner's Rule Would Do Just the Opposite.

To prop up his argument that the 1984 amendments to the ADEA are "not relevant," petitioner cites (Petition at 14) to the "workplace" test adopted by courts which

---

[5] The legislative history of the 1984 amendemnts, as the courts below found, confirms that Congress limited the extraterritorial application of the ADEA to American controlled companies *only*, because Congress recognized that delicate issues of international relations were involved in extending the ADEA to other countries' territory. Congress wanted any such extension of the Act to be as inoffensive as possible and to tread as lightly as possible on the sovereignty of other nations. Thus, Congress sought to respect "the well established principle of sovereignty, that no nation has the right to impose its labor standards on another country." S. Rep. No. 98-467, 98th Cong., 2d Sess. 27-28 (1984). To achieve this result, Congress *explicitly excluded* from the extraterritorial reach of the ADEA all foreign companies that were not controlled by American employers.

had interpreted the ADEA prior to its amendment in 1984. In those cases, the courts determined that the ADEA prior to its amendment had no effect *at all* abroad, even where the relevant overseas workplaces were for *American* employers. Petitioner argues that the applicable law in cases, such as his, against a *foreign* employer should be determined by the location of the "workplace" of the applicant. But, petitioner ignores the history and the purpose of the "workplace" test, both of which establish that this test was simply a tool utilized by Congress and the courts to *further* the well-established principle *against* the application of U.S. law abroad. Petitioner attempts to use the test to eviscerate its very purpose.

The use of the "workplace" test to determine whether U.S. laws applied outside the United States, originated in Congress's response to this Court's decision in *Vermilya-Brown Co., Inc. v. Connel*, 335 U.S. 377 (1948), which gave the Fair Labor Standards Act (the "FLSA") a "very modest extraterritorial reach." *Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554, 558-59 (7th Cir. 1985). Congress responded to *Vermilya-Brown* by amending the statute to include a specific directive *against* its application abroad. Overseas Labor Standards Amendments, Pub. L. No. 85-231, § 1(1), 71 Stat. 514 (1957). The Senate Report accompanying the amendment explained that although the Court's decision was limited to "the Fair Labor Standards Act, [it] tend[ed] to raise difficult issues of sovereignty and offends the political sensitivities of the foreign governments concerned." S. Rep. No. 987, 85th Cong., 1st Sess., *reprinted in* 1957 U.S.C.C.A.N. *Fair Labor Standards Act—Overseas Area*, 1756, 1757. The FLSA was, therefore, amended to *explicitly prevent* "the application of the Act to geographic areas within a foreign country." S. Rep. No. 987, 85th Cong., 1st Sess., *supra* at 1758. Congress achieved this result by adding section 13(f) to the FLSA, which provides that the Act would not "apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country. . . ." 29 U.S.C. § 213(f).

More than twenty-five years later, the circuit courts concluded that because the ADEA incorporated § 13(f) of the FLSA, the ADEA had no application to "workplaces" abroad and dismissed ADEA claims that arose out of the decisions about the foreign "workplaces" of *American* companies. *See Lopez v. Pan Am World Services, Inc.*, 813 F.2d 1118 (11th Cir. 1987) (dismissing claim arising out of application for job in Venezuela); *S.F. DeYoreo v. Bell Helicopter Textron, Inc.*, 785 F.2d 1282 (5th Cir. 1985) (dismissing claim arising out of termination from job in Canada); *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121 (D.C. Cir. 1985) (involuntary retirement from job in France); *Pfeiffer*, 755 F.2d 554 (7th Cir. 1985) (termination from job in Germany); *Zahourek v. Arthur Young & Co.*, 750 F.2d 827 (10th Cir. 1984) (Honduras), *Thomas v. Brown & Root, Inc.*, 745 F.2d 279 (4th Cir. 1984) (Rotterdam); *Cleary v. United States Lines*, 728 F.2d 607 (3d Cir. 1984) (England).

The rules against extraterritorial application followed in these pre-1984 amendment cases furthered the intent of Congress as originally expressed when it first formulated the "workplace" test, which was to prevent the "application of the Act to geographic areas within a foreign country." S. Rep. No. 987, 85th Cong., 1st Sess., *supra*. Petitioner, on the other hand, seeks to use the test not to further its original purpose, but to accomplish exactly what it was created to prevent—the application of law to "geographic areas within a foreign country."[6]

---

[6] While admitting that no other court in this country has disagreed with the Third Circuit's narrow holding below that the ADEA does not apply to an independent foreign company deciding overseas how to fill foreign jobs, Petitioner claims that the "logic" of the Third Circuit's decision "conflicts" with three decisions, none of which were issued in the past decade. *See* Petition at 13-16 (citing *Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Lopez v. Pan Am World Services*, 813 F.2d 1118 (11th Cir. 1987); and

C. The ADEA Does Not Provide for Different Extraterritorial Rules in Cases of Promotion" Than in Cases of "New Hire."

Petitioner also argues that since he alleges that his claim is one for failure to "promote" rather than for failure to hire, he is entitled to some sort of protection

---

Zahourek v. Arthur Young & Co., 750 F.2d 827 (10th Cir. 1984)). In fact, the Third Circuit's decision does not conflict with the "logic" of any of the three opinions which petitioner cites.

First of all, none of the three decisions cited by petitoner involve claims against a foreign company for its decisions overseas about foreign jobs, and none of the cases cited by petitioner interpreted the 1984 amendments to the ADEA. To the contrary, *Lopez* and *Zahourek* were both decided before the 1984 amendments and held, in agreement with every other circuit that considered the question, that the ADEA prior to its amendment in 1984 had no extraterritorial effect whatsoever even to *American* firms. *Hishon* is even further removed from being pertinent to this case since it had nothing whatsoever to do with the extraterritorial reach of any federal statute. Rather, that decision dealt with the applicability of Title VII to law firm partnership decisions. Petitioner's claim here, however, is against a U.K. company for its decisions in the U.K. about filling foreign jobs, a claim the lower courts found invalid under the express terms of the 1984 amendments.

Moreover, to the extent that the "workplace" test utilized in *Lopez* and *Zahourek* in those pre-1984 amendment cases continue to have relevance to post-1984 cases such as this—an issue not addresed by Petitioner's brief—they clearly support the decisions below. For example, in *Lopez v. Pan Am World Services, Inc.*, a case the Third Circuit found to be "indistinguishable" from the facts here, Pet. App. at 7 n.5, the court used the workplace test where the plaintiff applied *in the United States* for a job in Venezuela with Pam Am, a *United States* corporation. The Eleventh Circuit dismissed Lopez' claim because "the work station for appellant's job *would have been* Caracas, Venezuela. Therefore, the ADEA, prior to its amendment in 1984, does not protect [Lopez] from age discrimination." *Id.* at 1120 (emphasis added). The courts below agreed with the reasoning of the *Lopez* court and found that the relevant "workplace" when a plaintiff claims that he should have received a job abroad is the geographic area where the work was to be performed. *See* Petition at 17 ("Petitioner's workplace *would have been* England or Australia. The relevant work site in a case of alleged discrimination against a job applicant is the location of

not afforded to unsuccessful "original applicants." Thus, for example, petitioner attempts to distinguish the *Lopez* decision by claiming that it has no application to him since that was an "original application" case. Petition at 15-16.

In essence then, petitioner admits that if a colleague of his who had a "workplace" with another Pharmaceutical company in Philadelphia in 1992 had applied for the identical jobs in the United Kingdom for SB plc, that individual's application would not be covered by the ADEA, but contends that his application should be treated differently because his was not an "original" application for the jobs. Hence, it is ironic that what the petitioner argues for here is a discriminatory rule. A rule which would protect those individuals seeking a promotion but not those seeking a new job. Such a result would be startling given that § 4(a)(1) of the ADEA, the primary operative provision setting forth unlawful employment practices, makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or to otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment." 29 U.S.C. § 623(a). Hence,

---

the position for which the plaintiff applied") (D. Ct.) (emphasis in original); *see also* Pet. App. at 7 n.5 (same) (3d Cir.). *Lopez* does not conflict with the "logic" of the courts below, as Petitioner claims, it wholly supports their findings.

Similarly, in *Zahourek v. Arthur Young & Co.*, 750 F.2d 827, 828 (10th Cir. 1984), the "principal issue," as stated in the first paragraph of that decision, was whether the ADEA applied "to the termination of employment of an American citizen by an American employer where the place of employment is in a foreign country." "The District Court held that the Act did not so apply. We agree." *Id. Zahourek*, therefore, merely held that the ADEA, prior to its amendment in 1984, did not apply extraterritorially to a foreign workplace of an *American* employer—it did not suggest much less hold that the ADEA after its amendment in 1984 would apply extraterritorially to punish a foreign company for its overseas decisions about foreign jobs.

Congress listed "refusal to hire" as the very first proscribed employment practice, which certainly suggests that discriminatory hiring practices were, if not of primary concern to Congress, certainly entitled to protection at least equal to that involving refusals to "promote," a practice not mentioned at all.

Not surprisingly, both the Third Circuit and the District Court wasted no time dismissing this *ad hoc*, results oriented argument in one sentence. *See* Pet. App. at 7 n.5 ("[T]he ADEA does not distinguish between failure to hire and failure to promote situations") (3d Cir.); Pet. App. at 17 ("Nothing in the text of the ADEA" supports a "distinction between applications for a promotion and applications for a new job"). The bottom line is that petitioner is forced into making such obviously tortured arguments because the statutory exemption is so clearly applicable to this case. The simple fact is that the ADEA states that it "shall not apply" overseas to a foreign company unless that company is "controlled" by a United States entity. 29 U.S.C. § 623(h)(2). And, it is undisputed that SB plc is not "controlled" by any such entity.

The only case cited by petitioner to support the allegation that the ADEA exempts foreign companies when they are making "hiring" decisions about foreign jobs but uses a different rule when the job selection decision is semantically labeled a "promotion," is *Hishon v. King and Spalding, supra.* But, the ADEA's express statutory exemption for independent foreign companies was not at issue in *Hishon*, and was not interpreted by this Court in *Hishon*, because the claim in that case was only that a United States employer acting within the United States had discriminated when making decisions about United States positions. Here, the statutory exemption for foreign employers was the "key provision" of the case, Pet. App. at 6, because petitioner's claim was that a U.K. company deciding in the U.K. how to fill U.K. jobs, should be sanctioned under the ADEA because it did not

select him to work in the U.K. Thus, nothing in *Hishon* even remotely suggested that when a job application claim is made against a foreign company for its overseas decisions about foreign jobs, the exemption for foreign companies may become "not relevant" (Pet. at 3) depending on how the application claim is characterized. Petitioner's arguments about *Hishon* were so far and so wide of any mark, that the Third Circuit was amply justified in not explaining why they were wrong.

CONCLUSION

Petitioner attempted to set forth a novel claim against a foreign company for its foreign decisions about foreign workplaces and, not surprisingly, lost. For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

STEVEN B. FEIRSON
Counsel of Record
DAVID M. HOWARD
PAUL D. SNITZER
DECHERT PRICE & RHOADS
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103
(215) 994-4000
Counsel for Respondent

July 18, 1997